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No. 87-585

In the Supreme Court of the United States

OCTOBER TERM, 1987

BURTON D. LINNE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "materiality" standard set forth in *United States* v. *Bagley*, 473 U.S. 667 (1985), was properly applied in this case to the alleged nondisclosure by the prosecution of a government investigator's report.

2. Whether, in the absence of a request by defense counsel at trial, the alleged failure of the prosecution in this case to produce a government investigator's report violated the Jencks Act, 18 U.S.C. 3500.

3. Whether the court of appeals erred in declining to consider an additional issue raised after oral argument.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 826 F.2d 1061 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1987. The petition for a writ of certiorari was filed on October 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and on numerous counts of mail fraud, in violation of 18 U.S.C. 1341 (Pet. App. 2a-3a). Petitioners Linne and Slater were also con-

victed on several counts of failing to file tax returns, in violation of 26 U.S.C. 7203 (Pet. App. 2a-3a). Petitioner Linne was sentenced to a total of six years' imprisonment and three years' probation; petitioner Imlay was sentenced to a total of six months' imprisonment and three years' probation; and petitioner Slater was sentenced to a total of 18 months' imprisonment and three years' probation (C.A. App. 267-269). The court of appeals affirmed (Pet. App. 1a-7a).

1. Petitioners' convictions and sentences arose out of various income tax evasion schemes that petitioner Linne designed and, with the assistance of petitioners Slater and Imlay, promoted and operated through the mails between 1982 and 1985 (Pet. App. 3a). One scheme, called the Administrative Notice and Declaration of Immunity (ANDI) program, advised prospective customers that a citizen's obligation to pay federal income taxes arises solely from voluntary participation in federal entitlement programs (*e.g.*, Social Security) and that, by filing with the government certain " 'notices of rescission' " provided by petitioners and then not availing oneself of government benefits, a tax-paying citizen may become a "disenfranchised freem[a]n' " who is no longer obligated to pay taxes (*id.* at 3a-4a). Approximately 100 persons, who paid between $2,000 and $31,000 each to petitioners, were induced to participate in the ANDI program during the pertinent period (*id.* at 4a). Another scheme, called Citizens for Dollars (CFD), was a check-cashing clearinghouse through which ANDI program subscribers could avoid using a commercial bank and the attendant obligation of having to pay federal income taxes (*ibid.*); during the 18-month period ending in August 1985, petitioners received more than $6.6 million in deposits under the CFD program, which generated service charges of more than $975,000 for petitioners (*ibid.*; C.A. App. 189, 194). Finally, petitioners promoted a foreign "investment serv-

ice," called the Bullion Fund, through which income could be concealed from the Internal Revenue Service. According to petitioners' promotional materials, persons could invest in this Bahamian entity without being subject to United States tax laws, disclosure laws, or IRS discovery procedures (Pet. App. 3a-5a).

At trial, a number of witnesses described petitioners' schemes and testified that they had been defrauded by those schemes (Pet. App. 5a). The government also introduced many examples of the documentary materials that petitioners had sent through the mails to promote their programs, as well as evidence that petitioners Linne and Slater had not filed tax returns in years in which their gross income had exceeded the amount for which filings are required (*id.* at 4a-5a). In support of the allegation that the Bullion Fund was part of petitioners' fraudulent scheme, the government called as a witness IRS agent James Rideoutte. He testified that he had investigated the existence of the Bullion Fund in the Bahamas and had discovered no evidence that the Bullion Fund was registered (*i.e.*, incorporated) in the Bahamas (*id.* at 13a-16a). Agent Rideoutte had his investigative report in his possession during his testimony and, in fact, he occasionally referred to it. Petitioners, however, made no request for its production at trial. Pet. App. 5a.

In their defense, petitioners claimed that they believed their activities were lawful, that they never intended to defraud their customers, and that their failure to pay income taxes was the result of their good faith belief that they were "legal nontaxpayers" (Pet. App. 5a).

2. Approximately nine months after the verdict, petitioner Linne filed a motion for a new trial. In the motion, he asserted that the government had violated Rule 16 of the Federal Rules of Criminal Procedure by not disclosing or permitting review of Agent Rideoutte's investigative report prior to trial (Pet. App. 5a). In support of the mo-

tion, petitioner Linne claimed that Agent Rideoutte's testimony did not completely or accurately reflect all of the information Rideoutte had acquired about the Bullion Fund during his investigation (*ibid.*). Petitioner Linne presented affidavits of two of his acquaintances, which stated that a Bahamian lawyer, Anthony Thompson, had told them that he and two other persons, Gordon Briggs and Sterling Quant, had created the Bullion Fund and had registered it in the Turks and Caicos Islands. *Ibid.*; C.A. App. 286-291. Petitioner Linne maintained that Agent Rideoutte's report included these facts and that, if defense counsel had been able to review it, he could have impeached the agent's testimony (Pet. App. 5a-6a). The district court denied the motion (C.A. App. 311-312).

3. The court of appeals affirmed (Pet. App. 1a-7a). In response to petitioners' contention that the government had violated the Jencks Act, 18 U.S.C. 3500, by failing to provide them with a copy of Agent Rideoutte's investigative report, the court held that, "[w]hile it is true that the government promised to disclose all Jencks material before trial, this concession did not obviate the [petitioners'] statutory obligation to request the agent's report at trial." The court noted that, although they were "aware that the agent was testifying from notes he had prepared, defense counsel failed to make any request to review them and therefore waived any Jencks Act complaint." Pet. App. 6a.[1] The court similarly rejected petitioners' argument that their due process rights under

[1] The government has consistently maintained throughout these proceedings that a copy of Agent Rideoutte's report was provided to petitioners prior to trial. Neither the district court nor the court of appeals made a finding on that issue. On May 21, 1987, petitioners filed a motion for disclosure of the report prior to oral argument, which was scheduled for June 2, 1987. The government did not object to petitioners' motion and provided the report to petitioners' appellate counsel immediately prior to oral argument.

Brady v. *Maryland*, 373 U.S. 83 (1963), had been violated. The court explained that "[t]here can be no *Brady* violation absent a showing of the materiality of the undisclosed evidence" (Pet. App. 6a), that "[w]ithheld evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different' " (*ibid.*, quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)), and that "[t]he government at trial presented overwhelming evidence, independent of the IRS agent's testimony, from which the jury could find that the defendants knew of the unlawfulness of their activities" (Pet. App. 6a-7a).

ARGUMENT

1. Petitioners rest their legal arguments on two factual premises: (1) that Agent Rideoutte perjured himself at trial; and (2) that the prosecutors knowingly allowed him to do so. Petitioners, however, have failed even to show that Agent Rideoutte's testimony was false, much less that it was intentionally false, or that the prosecutors knowingly elicited perjured testimony. Their principal legal argument (Pet. 4-16) is therefore without force, because it is based on factual assertions that the record does not support.

In attempting to establish that Agent Rideoutte's testimony was false, petitioners rely primarily on the alleged inconsistencies between Rideoutte's testimony at trial and the report of his investigation of the Bullion Fund in the Bahamas. In fact, in spite of petitioners' vehement insistence to the contrary, the two are not inconsistent at all. In his testimony, Agent Rideoutte stated that he had checked with the registrar of companies to determine whether the Bullion Fund was "registered" in the Bahamas, which he explained was the same thing as being incorporated in the United States. He found that neither the Bullion Fund nor the Bullion Management Corpora-

tion was registered in the Bahamas. He added that the chamber of commerce in the Bahamas had no record of the Bullion Fund, nor did the police department. Finally, he stated that he found no record of the Bullion Fund with the telephone company or the post office. Pet. App. 14a-16a.

Nothing in Agent Rideoutte's testimony conflicts with anything in his investigative report. In his report, Agent Rideoutte stated that the Bullion Fund was not registered in the Bahamas, although he noted that the Bullion Management Corp. was registered in the Turks and Caicos Islands (Pet. App. 10a).[2] The report stated, as Agent Rideoutte had testified, that the telephone company and the post office showed no record of the existence of the Bullion Fund. The report further reflects that Agent Rideoutte interviewed the two attorneys that Agent Rideoutte mentioned in his testimony—Sterling Quant and Anthony Thompson—and that Thompson provided Agent Rideoutte with information about the Bullion Fund. According to the report, Thompson said that he formed the Bullion Management Corp. at the request of Gordon Briggs in 1983, and he agreed "to manage the operation locally under Briggs' direction." Pet. App. 11a. Thompson said that he terminated his relationship with Briggs when Briggs failed to comply with Thompson's request for financial information and when Thompson learned that Briggs was prohibited from coming into the Bahamas. Based on his interview with Thompson, Agent Rideoutte concluded in his report that Thompson had "merely provided the cover and bank account so the money [sent to the Bullion Fund in the Bahamas] could then be forwarded back to Briggs or whomever Briggs wanted to receive it." Pet. App. 12a.

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[2] The Turks and Caicos Islands is a tiny British colony located southeast of the Bahamas.

Agent Rideoutte's findings, as summarized in his report, are entirely consistent with his trial testimony. In both, he reported learning nothing about the Bullion Fund from sources such as police files, the chamber of commerce, the telephone company, and the post office. And in both he noted that the Bullion Fund was not registered (*i.e.*, incorporated) in the Bahamas. To be sure, Agent Rideoutte did not discuss in his testimony the contents of his interview with attorney Thompson, but he was not asked to relate Thompson's statements to the jury, because Rideoutte's account of Thompson's statements would have been hearsay. Since defense counsel had objected to Agent Rideoutte's testimony on hearsay grounds, and since the court responded to the objection by permitting Agent Rideoutte's testimony only to the extent that it reflected that he did not find records of the Bullion Fund, petitioners are hardly in a position to complain that Agent Rideoutte did not discuss the contents of his interview with attorney Thompson. And if Agent Rideoutte had related what Thompson had told him, it would hardly have helped petitioners, since the substance of Thompson's experience with the Bullion Fund led Thompson to conclude that the Fund was a questionable entity run by someone who was not even allowed to enter the Bahamas. In fact, Thompson's conclusion—that Briggs was using Thompson and his post office box as a conduit for funds going to Briggs or those designated by him to receive the funds—was consistent with the government's theory that the Bullion Fund was not a legitimate investment company, but merely a conduit for funds generated in petitioners' scheme. Certainly Thompson's account of the Bullion Fund's activities and his cessation of representation of the Fund would have done nothing to buttress petitioners' defense of good faith.[3]

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[3] For example, petitioners were still promoting the Bullion Fund as a Bahamian entity as late as March 1985, months after Thompson said

The affidavits that petitioners produced in their motion for a new trial also failed to show that Agent Rideoutte's testimony was false. The affidavits stated that Anthony Thompson represented that he had participated in creating the Bullion Management Corporation and had registered it in the Turks and Caicos Islands (C.A. App. 286-291). One of the affidavits also stated, ambiguously, that the Bullion Fund had been registered "in Nassau" (C.A. App. 290). Petitioners rely on that statement to suggest that the Fund was registered in the Bahamas as well as in the Grand Turks and Caicos Islands. However, while the affidavit included information regarding the registration of the Bullion Management Corp., Ltd. in the Turks and Caicos Islands (C.A. App. 291), it contained no similar information suggesting that that company or the Bullion Fund was registered the Bahamas. Moreover, the affidavits relate that Thompson and Quant were unable to persuade Briggs to comply with Bahamian registration requirements (C.A. App. 289-290); that, as a result, Thompson and Quant discontinued their association with Briggs and the Bullion Fund at the end of 1984 (*ibid.*); that Thompson subsequently turned over all of the books and records of the Bullion Fund to "Caicos Worldwide Management Ltd.," which is located in the Turks and Caicos Islands (*ibid.*); and that Thompson discontinued his association with Briggs because "somebody was forging Sterling Quant's name to the Bullion Fund receipts which was another reason that he knew something was wrong" (C.A. App. 287). Thus, the affidavits do not in any way rebut Agent Rideoutte's statement that he found

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he had ceased representing the Fund. See C.A. App. 140, 341, 587; GXs 14, 114.

no records indicating that the Bullion Fund was registered in the Bahamas (see Pet. App. 15a).[4]

Because Agent Rideoutte did not perjure himself, there is no merit to petitioners' contention (Pet. 18-24) that the court of appeals erred in applying the "materiality" standard set forth in *United States* v. *Bagley*, 473 U.S. 667 (1985), to the alleged failure to disclose Agent Rideoutte's report. Concomitantly, petitioners are wrong in suggesting that the court of appeals should have invoked the "materiality" standard that has been applied in cases in which the government has made knowing use of perjured testimony. See *United States* v. *Bagley*, 473 U.S. at 678-679 & nn. 8 & 9.

In any event, petitioners have vastly overstated the importance of Agent Rideoutte's testimony; even if his testimony had been false or inconsistent with the contents of his report, the matter would not have been sufficiently significant to warrant a new trial. First, the question whether the Bullion Fund was registered in the Bahamas was not of great importance; what was important was that the petitioners promoted the Bullion Fund as a legal means of avoiding federal tax liability and tax investigations, when in fact the Bullion Fund was simply a means of generating large amounts of cash for petitioners from their victims.[5]

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[4] Even the affidavit of petitioners' current counsel states that the Bullion Fund was registered in the Turks and Caicos Islands; that affidavit suggests that the company was not "registered" in the Bahamas, but was merely licensed to do business there. C.A. App. 605-606.

[5] Although petitioners have featured Agent Rideoutte's testimony as if it were the linchpin of the government's case, in fact Agent Rideoutte was a minor witness whose direct examination occupies less than four pages of the transcript. Petitioners find great significance in a letter from the government to an official in Bermuda thanking him for his cooperation in the investigation of the Bullion Fund. In that letter, the government stated that the official's cooperation made the indictment possible. Petitioners quote that letter no fewer than eight times in the petition (Pet. 7, 19, 20, 27, 29). But while the Bullion

Moreover, Agent Rideoutte did not suggest in his testimony that petitioners had created or participated in the creation of the Bullion Fund, nor was it the government's theory that petitioners had played a role in setting up the arrangement by which the Bullion Fund received "investments" through an address in the Bahamas. Rather, the government's evidence—including petitioner Linne's admissions—showed that petitioners had promoted the Bullion Fund to their victims, and it further showed that the Bullion Fund was not a legitimate investment company and that petitioners caused the Bullion Fund to be used as a means of concealing income offshore.[6] For that reason, the fact that no one Agent Rideoutte spoke with in the Bahamas knew anything about petitioners Linne or Slater—a fact that was reflected in Agent Rideoutte's report—was not exculpatory or in any way inconsistent with either Agent Rideoutte's testimony or the rest of the government's proof.

Finally, the government did not rest its case exclusively on evidence concerning petitioners' use and promotion of the Bullion Fund; rather, the government showed that the Bullion Fund was only one of several methods that petitioners used in seeking to achieve the object of their con-

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Fund was obviously an important feature of the case, the significance of the Bullion Fund in the prosecution did not turn on the relatively minor matter of the status of the Bullion Fund in the Bahamas between 1983 and 1985, which was the only issue addressed by Agent Rideoutte's testimony.

[6] Petitioner Linne admitted at trial that he had associated with Briggs, that he had advised members of CFD to use the Bullion Fund, and that he had caused CFD members' funds to be sent to the Fund account in the Bahamas (C.A. App. 198-200, 214-216, 222). In addition, the government introduced various exhibits and the testimony of a former member of CFD to establish that petitioners had promoted and used the Fund as a means of concealing income from the IRS (C.A. App. 139-140, 328; GXs 8, 120).

spiracy. Thus, the court below correctly concluded that the "government at trial presented overwhelming evidence, independent of the IRS agent's testimony, from which the jury could find that the defendants knew of the unlawfulness of their activities"[7] and, accordingly, there was no *Brady* violation (Pet. App. 6a-7a).

2. Petitioners similarly err in suggesting (Pet. 24-27) that they did not waive their rights under the Jencks Act. As noted above, there is no support in the record for petitioners' claim that Rideoutte perjured himself. Thus, petitioners are wrong in asserting (Pet. 24) that their waiver was somehow "fraudulently induced." Moreover, as the court of appeals explained (Pet. App. 6a (footnote omitted)), "[a]lthough aware that the agent was testifying from notes he had prepared, defense counsel failed to make any request to review them and therefore waived any Jencks Act complaint." See *United States* v. *Peterson*, 524 F.2d 167, 175 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976); *United States* v. *Simmons*, 281 F.2d 354, 358 (2d Cir. 1959); *United States* v. *Tellier*, 255 F.2d 441, 449 (2d

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[7] The government showed, for example, that in 1983 petitioner Linne had assisted in the writing of an appellate brief in which he advanced his "legal non-taxpayer" theory; the Court of Appeals for the Eighth Circuit found that theory to be "totally without arguable merit" (*United States* v. *Drefke*, 707 F.2d 978, 981, cert. denied, 464 U.S. 942 (1983); C.A. App. 204-205). To rebut petitioners' claims of good faith, the government showed that petitioners instructed purchasers to "judgment proof" themselves (C.A. App. 211-212, 228, 591; GXs 118-120); that petitioners offered their assistance in the event that any civil or criminal proceedings were brought against ANDI purchasers (C.A. App. 317-319); and that, to assure that the IRS would not discover and disallow the "immediate and drastic" tax savings which petitioners advertised the CFD program would produce, petitioners provided CFD customers with "non-photo blue pencils" for endorsing checks so that banks could not make photographic records of those customers' signatures (C.A. App. 123, 341; GXs 9, 50).

Cir.), cert. denied, 358 U.S. 821 (1958). This is true even though, as petitioners allege, a request was made for Jencks Act material prior to trial and the government, while implicitly representing that it had disclosed all the Jencks material, failed to disclose Rideoutte's report. See *United States* v. *McKenzie*, 768 F.2d 602, 607 (5th Cir. 1985), cert. denied, 474 U.S. 1086 (1986).

3. Finally, petitioners err in contending (Pet. 27-30) that the court of appeals "blundered" by refusing to allow them to add a new issue to their appeal after oral argument. They argued that the court of appeals should have ordered the disclosure of grand jury transcripts so that petitioners could determine whether the prosecutors misled the grand jury. Apart from the fact that this contention was raised too late in the court of appeals, it is totally without merit. There is no foundation in the record for petitioners' claim that the prosecutors and Agent Rideoutte perpetrated a conspiracy in the District Court and that the activities of these individuals before the Grand Jury were part of a continuing conspiracy. Nor have petitioners even made a threshold showing of why they should be permitted to examine portions of the grand jury record not already provided to them. See *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400-401 (1959) (defendant must demonstrate "a particularized need" for the evidence which outweighs the policy of grand jury secrecy). In any event, even if there were some error in the legal presentation to the grand jury, the petit jury's verdict renders any such error harmless. See *United States* v. *Mechanik*, 475 U.S. 66 (1986).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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